

FEDERAL CIRCUIT COURT OF AUSTRALIA

*IQBAL v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 1896

Catchwords:

MIGRATION – Application for judicial review of decision of Administrative Appeals Tribunal – show cause hearing – applicant asserting decision of delegate factually incorrect – delegate not believing applicant in any event – decision of delegate not before the Court – Tribunal applying time of decision criterion – Tribunal clearly correct – application dismissed.

Legislation:

Migration Act 1958, ss.5F, 5CB, 476(2)(a)

Migration Regulations 1994, cl.801.221

Federal Circuit Court of Australia Rules 2001, r.44.12

Applicant:	SHOAIB IQBAL
First Respondent:	MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	MLG 1531 of 2015
Judgment of:	Judge Burchardt
Hearing date:	7 July 2016
Date of Last Submission:	7 July 2016
Delivered at:	Melbourne
Delivered on:	2 August 2016

REPRESENTATION

Counsel for the Applicant: Mr S. Iqbal in person

Counsel for the First Respondent: Ms Gangemi

Solicitors for the First Respondent: Australian Government Solicitor

ORDERS

- (1) The Application filed 3 July 2015 is dismissed pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001*.
- (2) The Applicant shall pay the First Respondent's costs fixed in the sum of \$3,606.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 1531 of 2015

SHOAIB IQBAL

Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. On 3 July 2015 the Applicant filed an application seeking judicial review of a decision of the Migration Review Tribunal (now the Administrative Appeals Tribunal). The Tribunal affirmed a decision of a delegate of the First Respondent not to grant the Applicant a Partner (Residence) (Class BS) Visa.
2. On 11 November 2015 Registrar Burns made orders by consent which inter alia referred the application for a hearing pursuant to r.44.11(b) of the *Federal Circuit Court Rules 2001* (Cth) for a Show Cause hearing. The Applicant was provided the opportunity to file and serve written

submissions, as was the First Respondent. Only the First Respondent has done so.

3. The grounds of application are as follows:
 1. The Relationship was genuine at time of application and interview.
 2. The Partner visa was because of relationships since 2009.
 3. The Department played a big part in the relationship breakdown.
4. The affidavit filed contemporaneously with the application repeats the grounds of application seriatim and annexes a copy of the Tribunal's decision.
5. The Tribunal noted at para.1 that the application was for review of a decision made by a delegate of the Minister refusing the Applicant's visa application.
6. The original application for the visa was filed on 17 January 2011 on the basis of the Applicant's relationship with his sponsor. The Tribunal noted that the criteria to be satisfied in respect of the visa for which the Applicant applied included cl.801.221 of the *Migration Regulations 1994*. The Tribunal noted the delegate refused to grant the visa on the basis that the Applicant did not satisfy cl.801.221(2) because the delegate was not satisfied that the Applicant and the sponsor lived together in a genuine and continuing relationship and, accordingly, did not meet the definition of spouse or de facto partner as defined in ss.5F and 5CB of the *Migration Act 1958* ("the Act").
7. The Tribunal noted at para.6:

"The issue in the present case is whether at the time of decision the applicant continues to be the spouse or de fact (sic) partner of the sponsor."
8. The Tribunal noted that relevantly to the matter cl.801.221(2)(c) required that at the time of decision the Applicant be the spouse of the sponsoring partner who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen (subject to certain conditions).

9. The Tribunal was satisfied on the evidence before it that the sponsor was the sponsoring partner of the Applicant.
10. The Tribunal went on to refer at para.8 to the definition of “spouse” in s.5F of the Act, and noted at para.9 that the Applicant and his sponsor were married to each other and satisfied, therefore, the requirement of s.5F(2)(a) of the Act.
11. As the Tribunal correctly inferred, the applicant was also required to satisfy the three further criteria in s.5F(2)(b), (c) and (d) which are relevantly:

“(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.”

12. Leaving aside other matters, the Tribunal found at para.16:

“The applicant gave evidence that his relationship with his sponsor experienced a number of problems in their marriage which resulted in them separating in or about late May 2014 although they continued to live under the same roof for a few months. The applicant gave evidence that they separated permanently when he moved out of the house in August 2014. They have not lived together since that time and the applicant is in the process of applying for divorce.”

13. In the light of that assertion, the Tribunal concluded at paras.21 - 22 that the applicant did not meet the requirements of s.5F(2)(b) (mutual commitment to a shared life as husband and wife to the exclusion of all others) or s.5F(2)(d) (live together or do not live separately and apart on a permanent basis). The Tribunal went on to say at para.23:

“The Tribunal therefore finds that at the time of decision the applicant is not the spouse of the sponsor, who is the person who was specified as the applicant’s spouse in the Subclass 820 application. Therefore, the Tribunal finds that the applicant does

not meet the criterion contained in cl.801.221(2)(c) for the grant of a Subclass 801 visa.”

14. The Tribunal then dealt with certain other matters not presently relevant, and concluded at para.28 relevantly:

“Therefore, the applicant does not meet the prescribed criterion contained in cl.801.221(1) and cannot be granted a Subclass 801 visa.”

15. This being a Show Cause hearing, it is conducted pursuant to r.44.12 of the court’s rules. This relevantly provides that:

“(1) At a hearing of an application for an order to show cause, the Court may:

(a) if it is not satisfied that the application has raised an arguable case for the relief claimed – dismiss the application; or

(b) if it is satisfied that the application has raised an arguable case for the relief claimed – adjourn the proceeding and order a respondent to show cause at a final hearing why an order for the relief claimed should not be made on such of the grounds mentioned in the application as are specified by the Court; or

(c) without making an order under paragraph (b), make final orders in relation to the claims for relief grounds mentioned in the application.”

16. When the matter came before the Court the Applicant, who was self-represented and extremely fluent in English, said that the First Respondent’s submissions did not address the matter he was disputing. The decision of the delegate was given on 6 May 2014. There was no evidence before the delegate that he did not satisfy the regulation requirements. He had gone to the Tribunal about the delegate’s decision but by the time of the Tribunal hearing he was no longer in the relationship. At the time of the refusal by the delegate he was in the relationship but the delegate did not accept this and he did not get permanent residence as a result. He submitted that the Migration Review Tribunal should have assessed his application as against the time of the delegate’s decision.

17. Counsel for the Minister submitted that the delegate's decision was a primary decision pursuant to s.476(2)(a) of the Act and this Court had no power to review that decision. That submission is plainly correct.
18. Counsel also pointed to the fact that cl.801.221 is a time of decision criterion.
19. Given that cl.801.221 in schedule 2 of the *Migration Regulations 1994* is immediately under a heading "801.22 Criteria to be Satisfied at Time of Decision", it is clear that the Minister's submission is correct.
20. Although this puts the matter shortly, regrettably, the Applicant's submissions are completely misconceived. Not only was he disbelieved by the delegate, contrary to the position he would now wish to advance, it is not the delegate's decision that is before this Court for review but rather that of the Tribunal. Given that the Applicant readily concedes that his relationship did not subsist at the time of the Tribunal's decision, it is absolutely clear that the Tribunal's decision was correct.
21. Regrettably for the Applicant, he has been quite unable to show that he has an arguable case for the relief he seeks. It is plain that his application, to the contrary, has no prospects of success whatever. Accordingly, pursuant to r.44.12(1)(a) I order that the application be dismissed with costs.

I certify that the preceding twenty-one (21) paragraphs are a true copy of the reasons for judgment of Judge Burchardt.

Date: 2 August 2016